

Tenure Testimony of Dr. Patricia Cole  
House Education Committee  
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By way of introduction, I am the Superintendent of Wyandotte Public Schools. I have been a superintendent for 17 years and chief negotiator/labor person in the District for the past 24 years. For the past 2½ years I have been on the State Tenure Commission as the superintendent representative.

Several cases involving the discipline of tenured teachers have been the subject of previous testimony before this Committee. I appreciate this opportunity to RESPOND TO TESTIMONY so that the Committee gets a fair picture of those cases:

1) The case of Mary Ruth Clark, a Swartz Creek teacher, has been the subject of considerable testimony critical of the Tenure Commission's decisions. It is important to point out that the Commission's decisions in the *Clark* case have been reviewed by 3 panels of the Michigan Court of Appeals and by the Michigan Supreme Court 3 times. Each time, the courts have denied leave to appeal. The Court of Appeals has stated repeatedly that it found no merit in the school district's challenges, and the Supreme Court has three times summarily denied appeal from the Court of Appeals decisions.

Although the procedural history of the Clark case became very involved because of the school district's repeated requests for judicial review and because of the school district's failure to follow the Commission's decisions, the basic facts are fairly simple. The school district had concerns about Mrs. Clark's mental health in 2007 and, in Aug. 2007, it placed her on an involuntary leave of absence for 1 yr. Such leaves are allowed under the Teachers' Tenure Act. Mrs. Clark filed an appeal with the Tenure Commission. The Commission denied her claim of appeal, finding that the district had reason to place her on the one-year involuntary leave.

When the district did not re-employ her in Aug. 2008, however, Mrs. Clark filed another claim of appeal. In rulings in Jan. and June of 2009, the Commission agreed with Mrs. Clark that the district should have taken some action in Aug. 2008 since the Tenure Act only allows a district to place a teacher on involuntary leave for 1 year. The Commission clearly stated the options open to the district in August 2008 were: 1) re-employ Mrs. Clark, 2) file tenure charges against her, 3) lay her off due to a necessary reduction in personnel, or 4) grant her a voluntary leave of absence. Since Mrs. Clark did not request a leave of absence, and since no layoffs were happening, the district had to decide whether to re-employ Mrs. Clark or to file tenure charges against her in Aug. 2008. The Commission recognized the district could charge Mrs. Clark with incompetence based on a showing that she was not currently mentally fit to teach. The district had not filed a tenure charge against Mrs. Clark alleging unfitness. Instead, the district required Mrs. Clark to provide evidence that she was fit to teach. The Commission clearly told the district that it did not satisfy its obligation to take one of four allowed actions at the end of an involuntary leave. To hold otherwise would allow a district to keep a teacher on involuntary leave indefinitely, which would be unreasonable, unfair to both the teacher and the school community, and in clear violation of the Tenure Act. The Commission therefore ordered that Mrs. Clark be reinstated unless the district filed charges against her and suspended her in compliance with the Tenure Act.

Following those 2 decisions, however, the school district still did not file proper tenure charges against Mrs. Clark but instead asked for leave to appeal to the Court of Appeals and Supreme Court. As noted above, the appellate courts denied the district's several requests. The Court of Appeals specifically noted that there was no merit to the district's grounds for appeal.

The Commission considered the rights and responsibilities of the parties in the *Clark* case for the 4<sup>th</sup> time when Mrs. Clark challenged the school board's Feb. 2009 decision to discharge her. The charge filed against Mrs. Clark at that time was not that she was unfit to teach, but that she had not proved she was fit to return to work. The Commission again noted that the school district could possibly establish reasonable and just cause to discharge Mrs. Clark if it proved that she was currently unfit to teach. The key points were that current fitness was at issue, and that it is always the burden of the school district to prove a tenured teacher's unfitness. Numerous decisions of the Michigan Court of Appeals and the Michigan Supreme Court have held that the school board, and not the teacher, bears the burden of proof in the discharge of a tenured teacher. Because the district had not charged Mrs. Clark with incompetence or presented current evidence concerning her fitness to teach, it did not provide reasonable and just cause to discharge her. The Commission therefore granted Mrs. Clark's claim of appeal on October 20, 2009. Still, the school district did not file a charge of incompetence against Mrs. Clark but instead asked the Court of Appeals and Supreme Court to review the Commission's decision. For the 3<sup>rd</sup> time, the courts refused to review the case.

The Commission has never been presented with a charge of incompetence against Mrs. Clark. The Commission informed the district from the outset what the law requires. The legal fees the district has incurred to date are due to its failure to comply with the legal requirements, its filing of numerous appeals and mounting back pay responsibility due the teacher because of the district's failure to discharge her, despite the fact that the district testified before this Committee that she was not fit to teach.

Because other cases and accusations have been made regarding the Tenure Commission's work, I reviewed previous cases so that I could speak to them as well:

2) Another case that has been the subject of previous testimony involved Millington Community Schools teacher Linda Giffels. The charge against Ms. Giffels concerned her submission of altered meal receipts to support a \$12 claim for reimbursement at a school-related conference. The State Tenure Commission decided discharge was too severe a penalty. The Commission recognized that Ms. Giffels' offense was serious, but found her misconduct was an isolated incident in a 30 yr. career. That incident did not directly involve her classroom performance or her interactions with students. The only evidence concerning her teaching performance was positive. The most recent evaluation by her school principal described her as an "excellent," "remarkable" and "wonderful" teacher and a "valuable member" of the staff who was always available to help students. Three years earlier, her principal described her as caring and cooperative, and noted she helped many at-risk students. There was no evidence that cast any doubt on her success as a teacher, and the district presented no evidence that the misconduct was likely to happen again. After consideration of all the evidence, the Commission suspended Ms. Giffels without pay for over a year. Although the Commission did not find reasonable and just cause for discharge, it imposed a very serious level of discipline. The school district appealed to the Court of Appeals. The Court of Appeals reviewed the district's arguments about the appropriate level of discipline. The Court affirmed the Commission's decision, finding it supported by substantial evidence.

3) Other tenure cases mentioned in testimony to the Committee included the case of Glynis Flowers, a tenured teacher in Detroit Schools, and the 2003 case of Clarence Davis, a tenured teacher in Jackson Schools. In the *Flowers* case, the board voted to discharge the teacher, and the teacher appealed to the Tenure Commission. There was a hearing before an ALJ, who found the teacher's misconduct (using a school computer as security for a \$60 loan to buy a car tire to replace a flat tire) did not merit discharge but only a suspension without pay for 15 school days. The case was never reviewed by the

State Tenure Commission since neither the school district nor the teacher filed exceptions to the ALJ's decision.

4) In the 2003 *Davis* case, the local board voted to proceed on 6 charges against the teacher and to discharge him. The teacher appealed and there was a hearing before an ALJ, who found the district proved 3 of 6 charges. The ALJ determined that a penalty of suspension without pay from Oct. 2003 to the start of the 04-05 school year was appropriate discipline. The teacher filed exceptions with the State Tenure Commission challenging the discipline. Under the Tenure Act, the school district could also have filed exceptions, but it chose not to do so. The school district expressly indicated its agreement with the ALJ's decision by filing a statement in support of the decision. The only conclusion is that the school district believed the ALJ's decision about the level of discipline was reasonable in *Davis*.

5) In a case involving the Reed City schools, involved a teacher who attended a music concert out of state during the summer and smoked marijuana. The teacher experienced a drug induced psychosis which resulted in extremely bizarre and inappropriate actions for which he was arrested. There was medical testimony that his actions were not deliberate or intentional and were the result of a one-time reaction. The teacher had not smoked marijuana during his 13 year teaching career other than this incident. There was abundant evidence of the teacher's teaching excellence and testimony by parents that they supported his return to the classroom and that they trusted him with their children. The Commission recognized that there was no question that the teacher made a serious mistake that constituted professional misconduct. After a careful review of the entire record, however, the Commission found that discharge was too severe based on all of the evidence and that a lengthy suspension without pay was appropriate. In so doing we stated:

We do not lightly set aside the penalties requested by a local controlling board, whose sound judgment we do not call into question. Our determination of the appropriate level of discipline, however, is made with a background of considerable experience in reviewing tenure cases and is based on an objective consideration of evidence that may not have even been available to the local board. (Citation omitted) Here, we have carefully considered numerous exhibits and the testimony of many witnesses spanning three days of hearing.

As with all of the cases discussed here, it is only after a review of all of the evidence and a consideration of the reasons set forth in the Commission's decisions that the Commission's action can be fairly judged. It should also be noted that the Court of Appeals denied the district's application for leave to appeal in this case for "lack of merit in the grounds presented."

6) A final case about which there has been much discussion and on which I would like to comment is *Szopo v Richmond Community Schools Board of Education*, a case decided by the Commission in 1994. The teacher in that case was charged with 3 incidents of using unreasonable force and 1 incident of threatening a student with a pocket knife. (In response to a student sticking out his tongue at the teacher during class, the teacher took out his pocket knife and threatened to cut off the student's tongue if he did it again.) The local board members found that the 1<sup>st</sup> 3 charges were not proved but, by a vote of 5-2, they decided to discharge the teacher based on the 4<sup>th</sup> charge. The 2 dissenting board members would only have suspended the teacher for 3 semesters. The teacher appealed to the Tenure Commission, which, by a vote of 3-1, imposed a long suspension—from Nov. 1994 to the beginning of the 2<sup>nd</sup> semester of the 95-96 school year. The dissenting commissioner would have discharged the teacher.

Both the local board and the Commission struggled in determining the appropriate penalty as neither body was able to achieve unanimity in its decision on the issue.

The facts upon which the majority of the commissioners based their decision in *Szopo* included the teacher's 22½ years as an elementary school teacher in the district with no prior discipline regarding physical force or misconduct involving students. The only prior discipline had involved the teacher talking with other teachers on the school playground. The teacher had been rated very effective in all categories of instruction and classroom management by his principal. The principal had said that the teacher's intent during the knife incident "seemed harmless" and that suspension was not required. The evidence did not show that the student in question had been frightened by the teacher's actions. In fact, the evidence showed he had not taken the teacher's threat seriously since he continued to stick out his tongue at the teacher after the incident in question. The teacher admitted that he had made a mistake, but the Commission majority concluded that discharging him after a long teaching history marred only by this one error of judgment was excessive. They also noted that, in deciding to discharge the teacher, the local board majority may have been influenced by evidence that did not support the proven charge. The Ingham County Circuit Court affirmed the Commission's decision on appeal.

The Commission recognized that the teacher's behavior was inappropriate, seriously considered all factors and came up with a resolution that even 2 of the local board members preferred. In reaching its decision in this case, the Commission set forth factors for consideration to assist in determining the proper level of a penalty. These factors have become a guidepost in subsequent cases to help determine the proper level of discipline in a fair and consistent manner.

Based on the previous testimony before this Committee, I believe it may be helpful to this Committee to explain some of the HISTORY of the TENURE ACT to explain the reason for its current requirements.

- a) Before the major amendments to the Tenure Act in 1993, the local board held a hearing in tenure matters and the board's decision could then be appealed to the State Tenure Commission, which held another hearing. The Commission's decision could be appealed to the county circuit court, then to the Michigan Court of Appeals and, finally, to the Michigan Supreme Court. There were virtually no time lines and cases could linger on for years.
- b) The 1993 amendments eliminated the local board hearing (not opposed by local boards, whose members were often called upon to preside over hearings late at night or on weekends and whose decisions on occasion resulted in significant dissension in their local communities) and the appeal to the county circuit court. Strict deadlines were imposed for every step of the appeal process, resulting in significantly reduced times in resolving tenure appeals. As a result, the local board now only votes on whether to proceed on charges, without having the benefit of an evidentiary hearing in making its decision.
- c) It is not until the charges are appealed to the Tenure Commission that the only evidentiary hearing is held. Following this hearing, the evidence may not support some or all of the board's charges (illustrated by the *Davis* case discussed above), and the Commission must have the authority to arrive at a decision which is consistent with the evidence and to determine an appropriate penalty based on the proven charges.

- d) In 1990, the Michigan Supreme Court held that the State Tenure Commission has the authority to modify the penalty imposed by a local school district in tenure matters. The Court said that it was not reasonable to require the Commission to reinstate a teacher with back pay without imposition of any discipline where the Commission found misconduct charged by the district was proven, but that the discipline imposed by the board was excessive or not reasonable. That case, which was decided before the 1993 amendments, applies with even more force today because the local board no longer has an evidentiary hearing on which to base its charges and recommended penalty.
- e) If the Commission does not have the authority to modify the penalty, inequities would occur. If the Commission were to find, based on the evidence before it, that only one of several of the board's charges was proven, it would be faced with the dilemma of reinstating the teacher, even though some misconduct had been proven, or of upholding the board's penalty, which was based on the assumption by the board that multiple infractions had occurred and may not be appropriate under the circumstances.
- f) The Michigan Court of Appeals has held that the ALJ's decision is merely a recommendation or proposal for the agency to consider. The ALJ is not an employee of MDE and not necessarily an expert in the area of education law. (ALJ is an employee of the Michigan Administrative Hearings Services housed in the Dept. of Licensing and Regulation.) *(2 of the cases submitted by board attorneys, who testified before this Committee previously, as examples of alleged irrational findings by the Commission were in fact decisions by the ALJ and not the Commission.)* The State Tenure Commission is a gubernatorially appointed body, 2 of whom are classroom instructors, 1 a member of a board of education, 1 a superintendent of schools and 1 not a member of a board or a teacher, recognized as possessing expertise in tenure matters.

## PROPOSAL RESPONSES:

1. It has been proposed that the "reasonable and just cause" standard in the Tenure Act should be replaced with an "arbitrary and capricious" standard. The latter standard is a legal standard (which should be differentiated from the commonly understood or dictionary definition of the terms) construed by the courts to be a much lower standard of review that is highly deferential to the original decision maker, in this case, the local board. For the reasons explained above, it would be highly inappropriate for the Commission to defer to a decision made without a basis in an evidentiary hearing and that, in some cases, would be in opposition to the facts proven at an evidentiary hearing. It also would raise serious due process concerns. The "reasonable and just cause" standard allows maximum flexibility in determining possible reasons for discipline and in assessing the appropriate level of discipline. In addition, the necessary deference, required by the proposed standard, to the local board's decision would overturn decades of appellate court precedents that hold that the Commission's decision is without such deference.
2. Additional due process concerns are also posed by the proposal to remove tenure from tenured teachers who are rated ineffective a certain number of times and by the proposal to suspend the salary of a teacher against whom charges are pending but before a final decision has been made following an evidentiary hearing. The Michigan Court of Appeals, the Michigan Supreme Court, a Michigan federal district court and the U.S. Court of Appeals for the circuit that includes

Michigan, have all recognized that teacher tenure in Michigan is a property right protected by constitutional due process requirements. The U.S. Supreme Court has recommended that suspensions preceding an evidentiary hearing determination be with pay. An alternative to due process concerns that may result from removal of tenure from a teacher as a result of ineffective ratings would be: to provide a statutory rebuttable presumption of reasonable and just cause for discharge where a teacher has been rated as ineffective, a sufficient (as determined by assessment experts) number of times, similar to the rebuttable presumption for teachers convicted of certain crimes.

3. One of the benefits of the 1993 amendments to the Tenure Act was the requirement, for the 1<sup>st</sup> time in Mich., of teacher evaluations for probationary and tenured teachers. The Tenure Act requires that a teacher receive an individualized development plan (IDP), at least 2 classroom observations and a final year-end evaluation based on an assessment of the teacher's progress in meeting the IDP goals. I am concerned that the proposal to remove the penalty for districts failing to provide these requirements (i.e., a presumption of satisfactory service) will remove the incentive for districts to comply with this beneficial statutory requirement. These evaluation requirements are above and beyond statutory evaluation requirements (new RTTT evaluation language) contained in §1249 of the School Code. I believe that the tenure evaluation requirements should be maintained and that they should be tied in with §1249 requirements to avoid multiple evaluations by school districts. The presumption of satisfactory service for failure of a district to comply with tenure evaluation requirements could be made contingent upon the attainment of an acceptable effectiveness rating under § 1249.

Finally, it has been my observation while serving on the Commission that districts that regularly evaluate their teachers and document any shortcomings are successful before the Commission. A teacher is entitled to due process before being discharged and that is the primary purpose of the Tenure Act. Arbitration is not a substitute for tenure. While arbitrators are experts at interpreting collective bargaining agreements, they may not be experts in interpreting tenure law. Rather than having hundreds of differing interpretations made by arbitrators' decisions, which have no precedential value, the body of tenure law provides one consistent interpretation of the law statewide.

As the school board attorneys testified before this Committee, districts rely on this guidance from Tenure Commission precedent. I fear that if there was no tenure remedy, in many cases disputes would result in court suits, which would be far more costly and consume far more time than the tenure process. I ask that this Committee carefully consider the due process concerns that have been raised, because it is ultimately school districts that will face the expense of defending the constitutionality of the new provisions before the appellate courts.

I am grateful for this opportunity to provide my thoughts on the tenure reform process. I welcome the opportunity to address this Committee again when the Commission has had an opportunity to thoroughly review the legislative proposals and to meet and discuss proposed reforms.